

## Federal Privacy Board Finally Set to Act - Effectiveness Remains Highly Questionable

December 2, 2013 - Although it was first created in 2004, the federal Privacy and Civil Liberties Oversight Board (PCLOB) has had virtually no impact on government snooping in the lives of private citizens. Both the Bush and the Obama administrations appear to have wanted it that way. When it was first created, the board had no independence could be censored by the White House. So congress recreated it as an independent federal agency in 2007 but neither the current or last president felt a need to appoint members. That is, until recently. As of last May, the board is fully staffed and could begin issuing regulations soon.

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Members of the newly constituted agency were thrown from the frying pan directly into the fire shortly after their senate confirmations. That's because the new chairman of the agency was confirmed just a couple of weeks prior to the first NSA leaks made by Edward Snowden. The very first task taken on by the agency has been a review of the NSA's domestic spying program. The first reports are expected to come out shortly.

Once those reports are released, the board is likely to start holding public hearings on the matter. From there, it could start issuing federal regulations on the collection, storage and use of consumer data by the federal government. What those regulations could look like however is anything but clear. And whatever the agency does is likely to be controversial for a variety of reasons.

As with any federal board, the system under which the PCLOB works is blatantly political in nature. All members of the board are political appointments. This fact alone calls the objectivity of their decision making process into question. Beyond that, the NSA scandal deals with issues of national security. Regardless of anything decided by the board, the Constitution places this particular issue in the hands of the President and federal courts have been extremely reluctant to

overrule Executive Branch decisions. Even if the board issues rules that are favorable to the average citizen, if those rules are ever violated and taken to court it is quite likely that federal courts will rule in the favor of the President.

Another issue is that while the federal government likes to say that rules issued by federal agencies have the power of law, the fact of the matter is that rules are not laws. No federal agency has the authority to issues rules that trump an existing law. And since many of the issues that the board is likely to deal with will also involve issues covered by the Foreign Intelligence Surveillance Act, and the federal court that this act created, PCLOB is already hamstrung in any issue regarding domestic spying.

It should also be noted that the PCLOB's only oversight authority has to do with programs dealing with terrorism and intelligence gathering. It has no authority to regulate privacy issues that are unrelated to these areas such as the federal healthcare exchange. That's unfortunate given the fact that there have already been multiple data breaches and privacy issues associated with the rollout of the Affordable Care Act.

At this point, it would appear that the PCLOB does little more than provide some political cover to the administration and congress for privacy violations associated with domestic spying. Its authority is questionable at best and while we hope we are incorrect, we expect the agency to have very little impact on the way that the federal government collects and uses data on American citizens.

byJim Malmberg

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